

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

2014 DEC 24 A 11:31

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

UNITED STATES OF AMERICA,

v.

JEFFREY STERLING,

Defendant.

Case No. 1:10-CR-00485

Hon. Leonie M. Brinkema

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION OF NON-PARTY MICHAEL W. SHEEHY FOR AN ORDER PERMITTING
HIS COUNSEL TO SIT IN THE WELL OF THE COURT**

Non-party Michael W. Sheehy has received a trial subpoena issued by the prosecution. He understands that the prosecution intends to question him at trial regarding a meeting which occurred in or about August 2000, between defendant Jeffrey Sterling and the staff of the Permanent Select Committee on Intelligence of the U.S. House of Representatives ("Committee"). At the time of the meeting, in which Mr. Sheehy participated, he was the Committee's Minority Staff Director and Chief Counsel.

As explained more fully in the concurrently filed Motion of Non-Party Michael W. Sheehy for Protective Order (Dec. 23, 2014), the discussions which occurred at the meeting between Mr. Sterling and the Committee staff – as well as other information Mr. Sheehy might possess regarding Mr. Sterling and matters pertinent to this case obtained by Mr. Sheehy in the course of his employment by the Committee – are protected absolutely by the Speech or Debate Clause. *See* U.S. Const. art. I, § 6, cl. 1 (for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place"); *Eastland v. United*

States Serviceman's Fund, 421 U.S. 491, 501, 503, 506, 507, 509 & n.16, 510, 515 (1975) (protections of Speech or Debate Clause are "absolute"); *Doe v. McMillan*, 412 U.S. 306, 312 (1973) (privilege applies to all activities "within the 'legislative sphere'" (quoting *Gravel v. United States*, 408 U.S. 606, 624-25 (1972))); *Gravel*, 408 U.S. at 616, 618 (Clause's protections apply "not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself;" thus, in applying Speech or Debate Clause, "a Member and his aide are to be treated as one" (quotation marks omitted)).

In this case, the Committee has elected to not assert the Speech or Debate Clause privilege with respect to – and expressly has authorized Mr. Sheehy to testify regarding – certain otherwise protected matters. In particular:

the Committee has authorized Mr. Sheehy to discuss matters involving a meeting held by Mr. Sterling with Committee staff on or about August 8, 2000, and to provide testimony about that meeting in the trial of United States v. Sterling, so long as appropriate protections are in place to prevent the public disclosure of any classified information.

Letter from Christopher Doneso, Chief Counsel, Comm., to William M. Welch II, Senior Litig. Counsel, U.S. Att'y's Office for E.D. Va. (Oct. 12, 2011), attached as Ex. A; *see also* Letter from Mike Rogers, Chairman, & C.A. "Dutch" Ruppertsberger, Ranking Member, Comm., to Eric Olshan, Deputy Chief, Pub. Integrity Section, Criminal Div., U.S. Dep't of Justice (Dec. 4, 2014), attached as Ex. B.

The Committee's authorization and its non-assertion of the Speech or Debate privilege do not extend to other matters. Accordingly, to the extent, if any, the prosecution and/or counsel for the defense seek to question Mr. Sheehy at trial about matters that fall outside the narrow scope of the Committee's authorization, such questions may be subject to a Speech or Debate

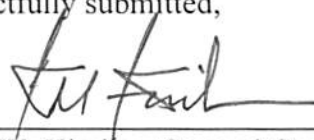
objection.¹ To enable Mr. Sheehy to assert such Speech or Debate objections (as well as any other privilege or other objections), should they be appropriate, his counsel should be permitted to sit in the well of the Court for the duration of Mr. Sheehy's trial testimony and to assert privilege and other objections and arguments in support, if and as appropriate. Other courts have granted similar relief in similar cases. *See, e.g.,* Order, *United States v. Renzi*, No. 4:08-cr-00212-DCB-BPV (D. Ariz. May 14, 2013) (ECF No. 1184) (“[C]ounsel for potential trial witness, [a former House staffer], may sit in the well of the Court during his appearance at trial to assert privilege objections – including, but not limited to, objections based on the Speech or Debate Clause of the Constitution, U.S. Const. art. I, § 6, cl. 1, and the attorney-client privilege – as necessary, and to present supporting arguments, as appropriate.”), attached as Ex. C; *United States v. Suarez*, No. 5:13-cr-00420 (N.D. Ohio June 9, 2014) (ECF No. 230) (similar), attached as Ex. D.

Undersigned counsel, Kerry W. Kircher, will appear at the trial with Mr. Sheehy.²

¹ Such questioning by the defense might also be subject to a “beyond-the-scope” objection by the prosecution.

² While it does not appear that Mr. Kircher's representation of Mr. Sheehy at trial will entail any contact with classified information, the Court should be aware that Mr. Kircher holds Top Secret and SCI security clearances.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kerry Kircher", written over a horizontal line.

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Counsel for Non-Party Michael W. Sheehy

December 24, 2014

CERTIFICATE OF SERVICE

I certify that on December 24, 2014, I served a copy of the foregoing Memorandum of Points and Authorities in Support of Motion of Non-Party Michael W. Sheehy for an Order Permitting His Counsel to Sit in the Well of the Court by first-class mail, postage prepaid, and by electronic mail (.pdf format) on each of the following:

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